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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1371

SIGMUND GOLDBLATT, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to the United States Court of Appeals for the Fourth Circuit to review the order of that court entered April 8, 1969, denying petitioner's second petition for re-

hearing of a judgment affirming his conviction under a two-count indictment charging conspiracy and substantive violations of 18 U.S.C. § 1952(a)(3) (CA 2-3, 6-7).[1] Petitioner was sentenced to two years imprisonment (CA 418-419).

OPINIONS BELOW

The opinions of the court of appeals denying rehearing (the majority *per curiam* opinion, and the dissenting opinion of Judge Winter) have not yet been officially reported, but are set out in Appendix "A", *infra, pp.* 1a-5a. The earlier opinion of the court of appeals is reported at 392 F.2d 344 (4 Cir. 1968). The district court did not write or deliver an opinion.

JURISDICTION

The judgments of the court below were entered on February 5, 1968, and a petition for rehearing was thereafter denied. This Court denied timely petitions for a writ of certiorari, 392 U.S. 932, and for rehearing, 393 U.S. 902. After this Court decided *United States* v. *Nardello,* 393 U.S. 286, the court of appeals granted petitioner leave to file a second petition for rehearing and invited the Government to respond. On April 8, 1969, the court below handed down its opinions and entered an order denying rehearing. Thereafter, the court of appeals recalled its mandate of affirmance and stayed reissuance pending the filing and disposition of this petition. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). See *Wichita Royalty Co.* v. *City National Bank,* 306 U.S. 103, 106.

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[1] The abbreviation "CA" refers to the consolidated appendix printed for use in the court below.

QUESTION PRESENTED

In construing a state criminal statute which forms an essential ingredient of the federal offense, is a federal court required to follow the decision of the state's highest court authoritatively construing the state statute, or is it free to approach the substantive state law question "generically?"

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions involved are Art. I, § 9, cl. 3 (the *ex post facto* clause), and the Fifth and Sixth Amendments to the Constitution of the United States. The statutes involved are 18 U.S.C. §§ 371, 1952(a)(3), and §§ 18.1-278 and 18.1-279 of the Virginia Code. Pertinent portions of the constitutional provisions and statutes are set forth in Appendix "B" *infra.*

STATEMENT OF THE CASE[2]

Petitioner was convicted of conspiracy and substantive violations of 18 U.S.C. § 1952(a)(3) in connection with a zoning application in Fairfax County, Virginia (CA 2-3, 6-7). A concurrent sentence of imprisonment was imposed.[3]

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[2] A full statement of the facts is set forth in the Petition for Writ of Certiorari filed last term in *Wechsler* v. *United States*, No. 1377. The facts necessary to consideration of the legal issue tendered by this petition are set forth in the text.

[3] As the court of appeals recognized, 392 F.2d at 348 and n. 6, there is no evidence in the record to support petitioner's conviction on the substantive count of the indictment. The court below thought reversal of the substantive conviction "fruitless" in view of the concurrent sentence imposed. Cf. *Hirabayashi* v. *United States*, 320 U.S. 81.

Although petitioner maintained his innocence, he placed primary reliance on a legal defense. He contended that, notwithstanding that the final zoning occurred on July 25, 1962, any bribe in violation of Virginia's laws was *complete* prior to September 13, 1961 (the date 18 U.S.C. § 1952 was enacted), and, thus, it was impossible for any alleged conspirator to have used an interstate facility *after* § 1952 was enacted with *intent* to promote bribery under Virginia law.[4]

Central to petitioner's legal theory was the proposition that the crime of bribery under Virginia law was complete upon payment of the bribe.[5] To sustain this position, petitioner relied on the plain words of Virginia's bribery statute as construed by her highest court in *Ford* v. *Commonwealth,* 177 Va. 889, 15

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[4] As Judge Winter pointed out, if the Government proved anything at all, it proved a use of interstate facilities after enactment of § 1952 to realize a rezoning where, *prior to enactment of § 1952,* a supervisor had been bribed. 392 F.2d at 351-352. The jury was instructed, over objection, that these facts permitted conviction (CA 347, 359-360, 369, 373). The trial court also refused petitioner's request for an instruction that an *intent* to violate Virginia's bribery statute *after September 13, 1961* was required (CA 70, 358, 360).

[5] The Government conceded below (Br. for App. at 12 n. 5) that a check is a "thing of value" under Virginia law. Therefore, the Virginia crime of bribery was completed on September 9, 1961 when Supervisor Leigh wrote a check to Supervisor Cotten (CA 437). 392 F.2d at 353 (dissenting opinion). It is therefore immaterial that Cotten's bank subsequently negotiated the Leigh check in interstate commerce after enactment of § 1952, for the crime of bribery under Virginia law was already over. Even if this were not so, this check clearing transaction did not violate § 1952(a)(3) for the reasons which Judge Winter set forth. 392 F.2d at 353.

S.E.2d 50, 52 (1941). Petitioner clearly raised this issue at every step of the proceedings.[6]

The first time the case came before the Court of Appeals, it held that petitioner placed "a too heavy reliance on state law," 392 F.2d at 346, and ruled that "the *federal* crime continued until the re-zoning was accomplished on July 25, 1962." 392 F.2d at 347 (emphasis in original). Judge Winter dissented in an opinion which, in our view, is unassailable. 392 F.2d at 349-354.

This Court declined to review the case in that posture although it noted probable jurisdiction in another § 1952(a)(3) case the same day it denied certiorari in this one. *United States* v. *Nardello,* 392 U.S. 923. After *Nardello* was decided, 393 U.S. 286, however, the court below permitted petitioner to file a second petition for rehearing and called for briefs. The majority below thought *Nardello* reflected "some degree of impatience with fine lines, careful distinctions and labels" and read that case as permitting federal courts to look "at the elements of state crime generically." App. A at 3a. On that premise, it declined to follow the plain words of Virginia's bribery statute as authoritatively construed by her highest court. App. A at 2a. Judge Winter again dissented. *Id.* at 3a-5a.

REASONS FOR GRANTING THE WRIT

In *United States* v. *Nardello,* 393 U.S. 286, this Court held that when Congress used the words "extortion, bribery, or arson" in § 1952, it did not do so

[6] At trial, the issue was raised by a pre-trial motion to dismiss the indictment (CA 20, 80-86), by appropriate motion at the close of the Government's case (CA 288-289), and again at the close of the entire case (CA 343).

in the common law sense, but generically. The Court held that federal judges were to look at the *state* statute which a defendant had allegedly travelled interstate to violate and to determine first whether that statute could be classified generically as "extortion, bribery, or arson." If it could, federal prosecution was proper; if not, there was no federal crime. Having found the state statute to be one proscribing "extortion, bribery, or arson" generically, *Nardello* held that the next question was "whether the particular State involved prohibit[ed] the extortionate activity charged." 393 U.S. at 295.

This case presents the logical next step in this evolving and important area of federal criminal law. The question which *Nardello* did not answer, and which is squarely posed here, is *how* does a federal court decide whether the conduct proved constitutes a violation of the underlying state statute?[7] Believing that *Nardello* authorized it not merely to *classify* state extortion, bribery or arson statutes "generically," but also to *apply* the substantive elements of such statutes "generically," the court below refused to follow the clear words of Virginia's bribery statute as construed by Virginia's highest court. App. A at 2a. This holding raises profoundly troubling questions under § 1952 and the many other federal criminal statutes which incorporate, assimilate, or refer to state statutes as essential ingredients of federal crimes. *E.g.*, 18 U.S.C. §§ 13, 43, 892, 894, 922, 1073, 1084(b), 1153, 1262, 1821, 1953,

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[7] Following the decision in *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, this Court granted certiorari to consider the similar problem arising in diversity cases. *E.g.*, *Wichita Royalty Co.* v. *City National Bank*, 306 U.S. 103, 106 (following denial of a second petition for rehearing below); *Six Companies* v. *Joint Highway District No. 13*, 311 U.S. 180.

2511(d). It also raises an important question of federal criminal law which has not been, but which should be, decided by this Court.

The court below would have federal courts view the substantive elements of state crimes "generically" when those crimes form a constituent part of a federal offense This approach, unwarranted by anything said in *Nardello,* collides head-on with this Court's repeated rulings that defendants are convicted of crimes *only if* their conduct violates a statute as written and not "because their conduct * * * thwarts a general purpose sought to be effected by specific commands which they have not disobeyed." *Viereck* v. *United States,* 318 U.S. 236, 245. Equally significant, the "generic element" approach renders the term "unlawful activity" as used in § 1952 unconstitutionally vague. If that term is deprived of the certainty provided by the qualification "in violation of state law" and is applied "generically" instead, the statute is obviously invalid. *E.g., United States* v. *L. Cohen Grocery Co.,* 255 U.S. 81.

In our view, substantive questions arising under a state criminal statute which is an essential ingredient of a federal offense should be decided by complementary application of two familiar principles. First, the state statute, like any penal statute, must be strictly construed. *E.g., United States* v. *Wiltberger,* 5 Wheat. 76, 96. Second, the federal court must follow authoritative state court rulings which construe the state statute in the absence of "convincing evidence" that the state court would no longer rule the same way. *E.g., Six Companies* v. *Joint Highway District No. 13,* 311 U.S. 180, 188; *Stoner* v. *New York Life Ins. Co.,* 311

U.S. 464, 467. See generally, *West* v. *American Telephone & Telegraph Co.*, 311 U.S. 223; *Fidelity Union Trust Co.* v. *Field,* 311 U.S. 169. In other words, the methods of applying the principles announced in *Erie R. Co.* v. *Tompkins,* 304 U.S. 64 are as much applicable to state law questions arising under a federal criminal statute as they are to state law questions arising in diversity cases. Such a test clearly comports with the Congressional purpose in closing the channels of interstate commerce to those who would violate a state's criminal statutes, while imparting certainty and consistency into the application of both federal and state criminal laws.

If that, or any similar test be followed here, the decision below must be reversed. Virginia's highest court has squarely held that Virginia's bribery statute "prohibits three specific acts—the giving of a bribe, the offer of a bribe and the promise of a bribe, *any one of which is a complete crime in itself.*" *Ford* v. *Commonwealth,* 177 Va. 889, 15 S.E.2d 50, 52 (1941) (emphasis added). Under the test we urge, the court below should have followed *Ford* unless it found "convincing evidence" that Virginia's highest court would now decide the issue differently. The "convincing evidence" is all the other way.

In the first place, *Ford* construes the very state statute at issue here—a statute whose prohibitory verbs are "give, offer or promise" (§ 18.1-278) on the part of the bribor, and "accept" (§ 18.1-279) on the part of the bribee. Second, with *Ford's* construction on the books for a quarter of a century, the Virginia Legislature enacted still another bribery statute during its 1968 session and used substantially identical prohibi-

tory verbs. §§ 18.1-282.1-282.4, Va. Code (1968 Supp.).[8] Finally, the *Ford* construction is in accord with the settled common law rule,[9] the settled rule in the federal courts[10] and the settled rule in every state which has considered the problem[11]—all of which hold that the crime of bribery does not continue *past payment* of the bribe. Cf. *United States* v. *Irvine,* 98 U.S. 450, 451. In short, the court below refused to give authoritative weight to a construction of Virginia's bribery statute by Virginia's highest court in an opinion which not only fails to set forth "convincing evidence" for the contrary result, but which is devoid of any authority at all.

The rejection below of controlling state precedent and the adoption of the "generic element" test poses a question which is bound to recur. Indeed, it lurks in every prosecution for violating any federal statute which makes a state crime an essential ingredient of

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[8] The new statute, which supplements the statute involved here, prohibits the offer, conferring or agreement to confer a bribe on the part of the bribee (§ 18.1-292.2(1)) and the acceptance, or agreement to accept a bribe on the part of the bribor (§ 18.1-292.2(2)).

[9] *E.g.,* 3 Wharton's Criminal Law § 1383, p. 776 (1957 ed.).

[10] *E.g., Howard* v. *United States,* 345 F.2d 126, 128 (1 Cir. 1965); *Stephens* v. *United States,* 347 F.2d 722, 724 (5 Cir. 1965); *Wolf* v. *United States,* 292 Fed. 673, 675 (6 Cir. 1923).

[11] *E.g., State* v. *Bloqmenstiel,* 235 La. 860, 106 So.2d 288 (1958); *State* v. *Knight,* 54 Ohio St. 330, 43 N.E. 281 (1896); *State* v. *Harrah,* 101 W. Va. 300, 132 S.E. 654 (1926); *Curtis* v. *State,* 113 Ohio St. 187, 148 N.E. 834 (1925); *People* v. *Willis,* 24 Misc. 549, 54 N.Y.S. 52 (1898); *State* v. *Begyn,* 34 N.J. 35, 167 A.2d 161 (1960).

the federal offense.[12] Because of its obvious importance and because the *Wiltberger-Erie* solution which we urge is so clearly correct, this Court should grant certiorari to decide the question now.

CONCLUSION

By reason of the foregoing, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[12] With fifty penal codes construed by fifty state supreme courts, differing interpretations of the same generic offenses are to be expected. One example will suffice. In Mississippi and Ohio, it is a defense to an extortion prosecution that the defendant had a good faith belief that he was entitled to the money notwithstanding the fact that he "generically" extorted it from the debtor by threat of criminal prosecution. *State* v. *Ricks*, 108 Miss. 7, 66 So. 281 (1914); *State* v. *Barger*, 111 Ohio St. 448, 145 N.E. 857 (1924). On the other hand, New York and California do not recognize such a defense. *People* v. *Fichtner*, 281 App. Div. 159, 118 N.Y.S.2d 392, 398 (1952); *Lindenbaum* v. *State Bar*, 26 Cal.2d 565, 160 P.2d 9 (1945).